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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 513.

CITIES SERVICE GAS COMPANY, *Petitioner*

v.

WESTERN NATURAL GAS COMPANY, *Respondent*

On Conditional Cross-Petition for Writ of Certiorari to the Supreme Court of the State of Delaware

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Western Natural Gas Company (Western), the petitioner in Case No. 408, this Term, hereby submits its Brief in Opposition to the Conditional Cross-Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the Supreme Court of Delaware is reported at 201 A.2d 164 and is printed as Appendix B to Western's Petition for Writ of Certiorari in Case No. 408, this Term. The opinion and judgment of the

Superior Court of the State of Delaware in and for New Castle County are printed as Appendix C to the Petition in Case No. 408.

JURISDICTION

The opinion of the Supreme Court of Delaware was filed on May 21, 1964, and its judgment was entered on June 5, 1964. Jurisdiction of this Court is invoked by Petitioner Cities Service Gas Company (Cities) under 28 U.S.C. § 1257(3).[1]

QUESTION PRESENTED

Where a plaintiff brings an action in state court solely on state grounds, basing its right to recovery upon allegations that it made overpayments involuntarily and under business compulsion, can the plaintiff —despite the Natural Gas Act provision vesting exclusive jurisdiction in federal courts over actions to enforce rights and liabilities under the Act—defeat the defendant's right under both state and federal law to prove that the payments were in fact voluntary, on the ground that the Natural Gas Act gives the plaintiff an absolute right to restitution of overpayments?

STATUTES INVOLVED

In addition to the provisions of the Natural Gas Act cited by the Cross-Petitioner, § 22 of the Act, 52 Stat. 833, 15 U.S.C. § 717u, is also involved and is set forth in Appendix A hereto.

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[1] In Case No. 408, Cities argues that the judgment below is not "final" as to federal questions there decided. In No. 408, Western shows that the decision below is a final judgment within the meaning of 28 U.S.C. § 1257(3). However, if the Court should conclude in No. 408 that the judgment is not final as to questions presented in No. 408, the same conclusion must apply to the question here presented by Cities.

STATEMENT

A complete statement of this case is set forth in Western's Petition for Writ of Certiorari in Case No. 408, this Term.

REASONS FOR DENYING THE CROSS-PETITION

The Cross-Petition assumes that the issue of whether Cities made voluntary payments to Western was first raised by Western; that the Delaware Supreme Court found 8 cents to be the effective filed rate under the Natural Gas Act; that federal law bars all defenses in an action for restitution of alleged overpayments; and that, assuming federal law does control, state courts nevertheless have jurisdiction to allow recovery of such overpayments. These and other assumptions made by the Cross-Petition are completely erroneous.

1. The question of whether Cities made its payments voluntarily or involuntarily was not first raised as a matter of defense by Western. It was necessarily raised by Cities itself in its original and amended complaints since its action was for common law restitution. Moreover, the question was specifically raised. Repeatedly, Cities asserted that it made the payments under "compulsion" and "involuntarily" (R. A8), that Western kept "the involuntary payments", (R. A8), that Cities made each payment "involuntarily and under business compulsion and duress" (R. A21), that Cities acted "under compulsion" (R. A21), and that the increased price "compelled" Cities to seek increased rates (R. A21). Thus, this issue was in the case from the beginning at the insistence of Cities, and Cities cannot now claim that the trial court has no right to hear evidence on it and decide it.

2. Cities' claim that its rights and immunities were derived from the Natural Gas Act not only was never

made below but was scrupulously avoided, since such a claim would have automatically vested exclusive jurisdiction in a federal court under § 22 of the Gas Act and this Court's decision in *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656 (1961). A claimed ground for recovery not alleged in the complaint and, in fact, inconsistent with the grounds alleged in the complaint. may not be raised on appea..

3. Cities contends that the Delaware Supreme Court found 8 cents to be the effective filed rate under the Natural Gas Act. There has been no such holding. The Delaware court merely held that 8 cents was the contract rate, that the Federal Power Commission took no actions to change that rate, and that therefore 8 cents remained the effective rate. Accordingly, the only federal questions raised and passed upon below are those set forth by Western in its Petition in No. 408, and the question posed in the Cross-Petition is not properly here.

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[2] *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 609-610 (1953); *Standard Oil Co. of California* v. *United States,* 337 U.S. 293 (1949); *United States* v. *New York Telephone Co.,* 326 U.S. 638, 650-651 n. 18 (1946); *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U.S. 456, 486 (1924). Particularly apt is the holding in *Cedillo* v. *Standard Oil Co. of Texas,* 291 F. 2d 246, 248, 249 (5th Cir. 1961), *cert. den.* 368 U.S. 955 (1962): "Appellants, in their brief, make repeated references to the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., and alleged violations thereof by Standard in dealing with these appellants, but such arguments are inappropriate here since the 'Plaintiffs' Original Amended Petition' upon which this case was tried, made no mention of the Act and in no way brought the action within its scope. * * * Keeping in mind that this case is to be decided on common law principles and not pursuant to the National Labor Relations Act, appellants are forced to demonstrate * * * that the contracting parties intended the contract to be for their benefit * * *."

4. Regardless of what the Delaware Supreme Court held in regard to the effective rate, the Cross-Petition succeeds only in demonstrating in graphic fashion the confusion that can result from any assumption that the Natural Gas Act permits the exercise of plural jurisdictions over rates for regulated sales of natural gas. In this case, Cities sued in a state court alleging *solely* common law bases for its suit. Neither in its original complaint (R. A4-A9) nor in its amended complaint (R. A21) did Cities mention the Natural Gas Act or any other federal basis for its action. As pointed out above, this was not oversight but a deliberate attempt to avoid, because of §22 of the Gas Act and Federal Power Commission primary jurisdiction, any semblance of a suggestion that a federal right or immunity under the Natural Gas Act was essential to Cities' recovery. Thereafter the Delaware court held that Cities was entitled to recover, provided Cities could sustain the burden of establishing involuntary payments under duress or a contract right to refunds.

Cities now feels that the Delaware court "was in error as a matter of state law" in remanding the case (Conditional Cross-Petition, p. 7, n. 5), but apparently recognizes that it cannot petition this Court on that issue. Therefore, Cities changes its position and argues here that the Delaware court was bound by "principles of Federal law applicable to Federally-regulated commerce" to grant recovery without any requirement upon Cities to prove duress and involuntary payment, and without recourse by Western to *any* defenses. *Id.* at 7.

There is no such absolute right of restitution under federal law. This is shown by the very case cited by the Delaware court[3] and relied upon by Cities itself in

[3] Appendix B to Western's Petition in No. 408, p. 17a.

its Brief[4] to this Court in *Pan American, supra,* namely, *Natural Gas Pipe Line Co.* v. *Harrington,* 139 F. Supp. 452 (N.D. Tex. 1956), *aff'd. in part,* 246 F. 2d 915 (5th Cir. 1957). There, the District Court held that restitution was subject to the defense of voluntary payments (although the court went on to hold on the uncontroverted facts that business compulsion was proven) and that excess payments can be recovered only "to the extent that countervailing equities make it unjust" not to do so. *Id.* at 462-463.[5] The Court of Appeals agreed (246 F. 2d at 919-920): "Natural, of course, concedes that restitution will not lie if the excess payments were voluntarily made. Further, duress or coercion must exist, and the written protest does not, by itself, make the payments involuntary," citing *Union Pacific R. Co.* v. *Dodge County Commissioners,* 98 U.S. 541 (1879), and *Bank of United States* v. *Bank of Washington,* 31 U.S. (6 Pet.) 8, 12 (1832).

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[4] Brief for Respondent Cities Service Gas Company, filed March 20, 1961, pp. 33, 54, n. 42.

[5] The Court quoted in support this Court's ruling in *Atlantic Coast Line R. Co.* v. *Florida,* 295 U.S. 301, 310 (1935) to the effect that " 'Restitution is not a mere right. It is *ex gratia,* resting in the exercise of a sound discretion * * *.' " See also *United States* v. *Morgan,* 307 U.S. 183 (1939), which applied "equitable principles" to claims for recovery of rates paid under a voidable order issued under a federal rate regulatory statute; *Public Service Commission of New York* v. *Federal Power Commission,* 329 F. 2d 251 (D.C. Cir. 1964), *cert. den.* 377 U.S. 963 (1964), which held "equitable considerations" applicable to claims for refunds of amounts paid to producers under temporary authorizations issued by the Federal Power Commission under the Natural Gas Act, and *Portsmouth Gas Co.* v. *Federal Power Commission,* 247 F. 2d 90, 94 (D.C. Cir. 1957), which held the equitable doctrine of estoppel by acquiescence applicable to the issue of whether unilateral rate increases made without protest or an old contract controlled the rights of the parties.

Thus even if the holding below had been that federal law controlled, there is no conflict between federal and state law. Both apply equitable considerations. Both allow a defendant to show that the payments were in fact voluntary. Therefore, even if we were to assume that the Delaware court held 8 cents to be the filed rate under federal law, the case was properly remanded, as it would have been in a federal court, for evidence relating to the equitable defenses available in any action for restitution. Whether the Delaware court was applying federal or state law to the question of voluntary payments, Western could not be deprived of its defenses merely because Cities has chosen on appeal to switch its alleged ground of recovery.

5. Cities is in error in assuming that *Pan American* means that Cities may sustain its action in a state court when it switches to a claimed federal right of recovery, or that the state court has jurisdiction to enforce rights or liabilities of the parties controlled by an alleged effective rate filed under the Natural Gas Act.

Pan American was decided by this Court without reference to defenses,[6] and upon Cities' repeated assertions that all rights of the parties were controlled, as alleged in its complaint, solely by state law. This Court carefully circumscribed its opinion, holding that because the complaint was cast only in terms of state law, the state court could initially assume jurisdiction. This Court did not pass judgment on what effect the

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[6] Cities, as a party to the *Pan American* case, told this Court in its brief: "The single question presented to and decided by the Delaware Court was whether or not the trial court had jurisdiction, not to render a particular judgment, but to entertain the cases before it." Brief for Respondent Cities Service Gas Co., *supra* note 2, p. 20.

Natural Gas Act might ultimately have on the substantive issues (366 U.S. at 664), or upon the jurisdiction of the state court if that court proceeded to judgment. The Court repeatedly stressed, as did Cities in its brief,[7] that if a complaint does not disclose an essential element of the case to be a federal right or immunity, the case can be initiated in the state court, but the Court did not even imply that the plaintiff, by leaving out of its complaint an essential element of its case which would automatically have conferred exclusive jurisdiction on a federal court, could later rely upon that element to defeat state court defenses. See *Gully* v. *First National Bank*, 299 U.S. 109, 114, 117, 118 (1936).

Cities cannot have it both ways. It cannot first base its recovery on state law in its complaint, thereby obviating federal jurisdiction under § 22, and then defeat state law defenses by alleging that federal law, and federal law alone, controls. Either the federal right was, in the words of *Gully*, "collateral" and "merely possible" (*id.* at 118), in which case it could hardly defeat all defenses under state law, or it was "basic" and "necessary," in which case it had to be pleaded with the effect of ousting the state court of jurisdiction. Cities' contention here has a hollow ring in view of its assertion to this Court in *Pan American* that all of the rights existing before the passage of the Act

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[7] *E.g.*, "Examination of Cities' complaints in these proceedings * * * makes it clear beyond any doubt that the complaints are predicated wholly and solely on common-law theories of contract, restitution and unjust enrichment—causes of action over which state courts have traditionally exercised jurisdiction. The Natural Gas Act is not even mentioned in Cities' complaints. Nor does Cities rely upon the Natural Gas Act for its recovery." Brief for Respondent Cities Service Gas Co., *supra*, note 2, p. 24 (footnote deleted).

were still in effect, unless specifically changed by the Commission.[8]

6. We cannot emphasize too strongly what Cities is actually seeking in its Cross-Petition. If a remand becomes necessary, Western intends to show that Cities voluntarily and deliberately paid the higher 11 cents rate upon the calculated gamble that it could later recover all of the excess over 8 cents paid to Western, but retain that portion which it had in turn collected from its own nonjurisdictional customers.

In the footnote on page 3 of its Cross-Petition, Cities states that the moneys recovered by it in prior suits against producers involving the 11 cents rate "have been passed on to Cities' customers who paid an increased price on account of the void Kansas order." There is nothing to support this assertion. On the contrary, the record shows that approximately 35% of Cities' resales of the gas involved are non-jurisdictional customers whose rates were increased following commencement of Cities' payment of the 11 cents price. The record does not shown any obligation on Cities to refund any amounts to these customers that Cities might recover from Western.[9]

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[8] "As has been shown above, the rights upon which the instant suits are predicated are rights which clearly arise out of common law. Those rights existed prior to the Natural Gas Act and persist to this day, subject only to the power of the Commission to alter such rights in accordance with the Natural Gas Act [citing *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956)]. We submit, therefore, that the true test as to whether the instant actions can be maintained is whether the right to maintain the action would have existed without reference to the Act." Brief for Cities Service, *supra*, note 2, p. 32.

[9] See excerpts from Annual Reports of Cities Service Gas Company to the Federal Power Commission for the years ending 1954 (A287-A295), 1955 (A296-A304), 1956 (A305-A312), 1957 (A313-

The record further shows that Cities, with notice of Western's filings and of Commission actions involving the 11 cents rate, stood by without protest while that rate was accepted and recognized in Commission proceedings under §§ 4, 5, and 7 of the Gas Act, even though Cities apparently then considered that rate "unauthorized" by contract. Upon remand, Western can show that this was not oversight, but part of a carefully designed strategy by Cities whereby, without risk of loss, it could voluntarily permit the 11 cents rate to become effective under the Act, pay the 11 cents rate as filed, pass the cost on to *all* of its customers, recover back all amounts paid to Western, and retain approximately 35% of these amounts as a windfall.

Western cannot be denied all opportunity to prove these and other facts relating to the voluntary nature of Cities' payments. Such a holding would mean that any buyer could, with complete impunity and without reference to the effect upon the seller or the seller's defenses, first pay and then later recover any price it

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A318), and "Affidavit of J. C. Lizotte" (A320-A321). The Supreme Court of Delaware, in its opinion rendered March 28, 1963, although holding that the contract rate controlled and Cities was entitled to be made whole under the equitable doctrine of restitution, held further that "it is not entitled to a windfall." (*Western Natural Gas Co.* v. *Cities Service Gas Co.*, CCH Util. L. Rep. ¶ 10,336 (Mar. 28, 1963)). That Court accordingly remanded the case to the lower court for a determination of the facts, and such modification of the judgment as necessary to prevent such windfall. Later the Court granted Motions for Reargument filed both by Western and by Cities and, after reargument, rendered the opinion of which review is now sought. In the latter opinion, the court did not reach this windfall question, since it found a disputed fact to exist as to any right whatsoever to a recovery and remanded for full retrial under instructions whereby Cities could recover only by establishing either a contractual right of reimbursement or a right of restitution predicated on involuntary payment. The court thus left open the windfall question, stating "we think it inadvisable at this time to determine the other questions raised, such as the *amount of recovery*, if any, and the matter of interest."

chose over and above a filed rate—whether for tax reasons, to keep its book net deflated, or as here, to obtain payments from customers which it need never return.

7. In sum, Cities' Cross-Petition seeks to present a federal question not raised in its complaint, submits an argument predicated upon a non-existent "conflict" between federal and state law as to the availability of equitable defenses, and asserts an alleged federal right of recovery which, if properly raised, would have ousted the state court of jurisdiction. Accordingly, the Cross-Petition should be denied. We submit that the real answer to all of these conflicting theories is to hold, as Western urges in its Petition in No. 408, that the only effective rate is the rate permitted to become effective by the Federal Power Commission, and that exclusive jurisdiction over this controversy lies in the Federal Power Commission, particularly where, as here, the Commission's jurisdiction has already been engaged in so many ways.

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APPENDIX A

Section 22 of the Natural Gas Act provides:

Jurisdiction of Offenses; Enforcement of Liabilities and Duties

SEC. 22. The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law, brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254 and 1291-1294 of Title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter. [52 Stat. 833 (1938), as amended, 62 Stat. 875, 895 (1948); 15 U.S.C. § 717u]